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April 8, 2008

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: June 26, 2007

Case Number: TSO-0510

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. For the reasons discussed below, I have determined that the individual's access authorization should be restored.

I. Background

The individual has held a Department of Energy (DOE) access authorization for a number of years. Late in 2005, the individual disclosed to his supervisor that he had been accessing inappropriate internet websites from the computer at his work station. This disclosure was forwarded to the local DOE security office (LSO), which conducted a Personnel Security Interview (PSI) with the individual. The LSO determined that the individual's admission constituted derogatory information that created a substantial doubt about his eligibility for an access authorization. Because the security concerns remained unresolved after the PSI, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. See 10 C.F.R. § 710.21. That letter informed the individual that his access authorization had been suspended on the basis of information that created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and explained how the information fell within the purview of one potentially disqualifying criterion, Criterion L, which is set forth at 10 C.F.R. § 710.8(l).¹ The letter further informed the individual that he was entitled to a hearing before a Hearing Officer in

¹ Criterion L relates, in relevant part, to information that a person has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or undue duress which may cause the individual to act contrary to the best interests of national security . . ." 10 C.F.R. § 710.8(l).

order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Acting Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his wife, a treating psychologist, two supervisors, the LSO personnel security specialist who conducted the PSI, and two individuals who were involved in the investigation into the individual's misuse of his computer. The DOE submitted six exhibits before and during the hearing, and the individual submitted one four-page exhibit before the hearing. A transcript of the hearing was produced and will be hereinafter cited as "Tr."

II. Regulatory Standard

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. The Hearing Officer's role in this proceeding is to evaluate the evidence concerning the individual's eligibility for access authorization presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and evidence presented by both sides in this case.

III. Findings of Fact

The facts in this case are not in dispute. After the individual's mother-in-law died, his wife temporarily moved to another part of the country to take care of her father. Tr. at 9. The individual remained behind, working and taking care of their children. *Id.* The wife extended her stay with her father repeatedly, and returned rarely to visit her husband and children. PSI (DOE Ex. 2) at 7, 22. Ultimately, in 2000, the individual left his job and moved his family to unite with his wife and father-in-law. *Id.* He then secured a position at a DOE facility and, within a year, was granted an access authorization. *Id.* at 7-8. In October 2005, his father-in-law died. *Id.* at 17. Shortly after that event, the individual disclosed to his supervisor that he had been spending part of his work day using his work computer to view websites that contained adult material and photographs and to participate in on-line "chat rooms," in which he would

communicate by computer with unknown individuals on a variety of topics. *Id.* at 5, 8-10, 13-14. He sought counseling for this behavior through the Employee Assistance Program. *Id.* at 32.

The individual's employer then investigated the conduct he disclosed to his supervisor. A cyber-security investigator conducted an interview of the individual and an examination of the internet websites that had recently been accessed from the individual's work computer. The cyber-security investigator produced an Investigative Report (DOE Ex. 1), in which he found that during the 17 workdays between September 1 and October 10, 2005, the individual had directly entered 92 websites containing adult material, many of them multiple times. *Tr.* at 80. The investigator also reported that the individual's use of instant messaging alone, without including the time he spent accessing adult sites, far exceeded the one hour per week that he had informed the investigator he was spending engaging in computer abuse. *Id.* at 81, 83-84. In addition, the individual had spent considerable time on other websites, including eBay. *Id.* at 125. On the basis of that information, his employer suspended the individual from work without pay for 30 days. *PSI* at 34. The report was also provided to the LSO, which then conducted a PSI of the individual. During the PSI, the individual stated that he had viewed pornographic information on the internet for most of his adult life, beginning when he was 19 or 20 years old, at which time the internet was a novelty. *Id.* at 67-68. After he was married and had a family, he engaged in this activity at home only when his wife was not home and when his children were asleep. *Id.* at 67-68. He did not view pornographic material on the internet from a work computer until he began his current job, at which he felt bored, trapped, and isolated. *Id.* at 5, 8, 73. He also admitted that he had participated in chat rooms while at work, including dating services. *Id.* at 14.

The evidence in the record indicates that the individual stopped viewing pornographic material and participating in chat rooms while at work on the day he self-reported these activities to his supervisor, approximately two years before the hearing. The individual, by his own acknowledgment, continues to view pornographic material from his home computer.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should be restored at this time. I find that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Derogatory Information and Associated Security Concerns

According to the Notification Letter, the derogatory information that raised the LSO's concerns relate to the individual's use of his work computer to view adult websites, including pornographic material, and to participate in on-line chat rooms, in which he disclosed sensitive work-related and personal information. In the LSO's view, the individual's behavior, not only with regard to misusing his work computer, but also with regard to discussing the matter with others, present three categories of concerns that fall within Criterion L. First, the LSO contended

that the individual's misuse of his work computer is unusual conduct that raises concerns about his "honesty, judgment, reliability, and ability to be trusted." It also contended that the individual's extensive history of such behavior represents "misuse of Information Technology Systems." A second source of the LSO's concern about the individual's honesty was instances in which the individual minimized the extent of his computer misuse when discussing his behavior with his supervisor and later with the cyber-security investigator, and in which he denied any recollection of having "access[ed] any inappropriate internet sites after" he had disclosed his computer misuse, though the investigative report documented that he had visited eBay later on the same day of his investigation. Finally, two distinct sets of facts rendered him susceptible to pressure, coercion or duress: not fully disclosing his computer use to his wife, in the LSO's opinion, subjected him to the possibility of blackmail by anyone who might threaten to reveal to his wife facts that he had kept from her, and revealing information about his work and personal life to strangers made him susceptible to pressure or duress from a person who might seemingly offer him sympathy, while in reality might be engaging in counterintelligence activities to gather information from the individual.

Criterion L concerns that arise from computer misuse and failure to provide full, frank and truthful answers to investigators generally call into question an individual's self-control, judgment, or willingness to abide by rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) at Guidelines E and M; *Personnel Security Hearing, Case No. TSO-0422*, 29 DOE ¶ 83,017 (March 7, 2007) (improper use of government-issued computer). I find that the individual's personal conduct described above constitutes derogatory information that raises questions about the individual's honesty, reliability, and trustworthiness, and rendered him susceptible to pressure, coercion, or duress under Criterion L.

B. Mitigating Evidence

A finding of derogatory information does not, however, end the evaluation of evidence concerning an individual's eligibility for access authorization. *See Personnel Security Hearing (Case No. TSO-0508)*, 29 DOE ¶ 83,091 (November 27, 2007) (and cases cited therein). Rather, I must exercise my common-sense judgment in deciding whether the individual's access authorization should be granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the individual has produced sufficient evidence of mitigation to resolve the security concerns raised by his unusual conduct.

1. The Individual's Honesty, Reliability and Trustworthiness

The individual recognized he was engaging in "destructive behavior" by using his work computer to view pornographic materials and participate in chat rooms. At the time he was doing this, he now states, he would not have cared if he had been caught and fired for these transgressions. PSI at 10. He was unhappy with his job and with his marriage, and had he been terminated, he felt he could have returned to the part of the country he considers home and to a position more in line with his career. *Id.* at 17. After his father-in-law died, he underwent a change of heart. He came to the realization that he now cared about his marriage and lifestyle:

Even though [my wife] was very sad . . . , I could tell that . . . she needed me in her life . . . and in talking to [the ESP counselor], I found out that it's typical that during some traumatic event that people want to start their life anew, or something like that, and I think that's what happened to me. I just realized that, you know, [engaging in destructive behavior] is dumb. . . . I think it took that particular event for me to say, "I can't do this anymore."

Id. at 18. According to the individual, that was the motivation for him to step forward and acknowledge his transgressions. *Id.* At the same time, he and his wife began a slow process of reconciliation. *Id.* at 31.

It is to the individual's credit that he voluntarily reported his behavior to his supervisor. Even though before his father-in-law died, he had apparently been indifferent as to whether he might get caught misusing his computer, after his change of heart, he felt it incumbent upon him to report his wrongdoing. *Tr.* at 210. The individual's treating psychologist, an employee of the facility's employee assistance program, testified that the father-in-law's death may well have triggered the individual's change of heart:

The idea is that motivation to change is brought about by insight or . . . some cognitive dissonance . . . or distance between where one is and where one wants to be, and so the death of someone close can bring one in touch with . . . more [internal] factors or more moral or ethical issues in life, and so it's very likely that that could have brought some insight into his life.

Id. at 302-03.

I also find it much to the individual's credit that he sought out counseling for his aberrant behavior. His treating psychologist presented his professional assessment through his testimony at the hearing. The psychologist explained that he found no psychiatric diagnosis that applied to the individual. *Id.* at 292. Rather, he formed the opinion that the individual "has some impulse control issues that . . . when we concluded [the course of counseling] he had some insight about and was able to manage." *Id.* at 293. The focus of the counseling was the individual's viewing of pornography at work, not the matter of pornography in general. *Id.* The psychologist explained that, as a clinical psychologist, he addresses whether a behavior causes dysfunction or distress. *Id.* at 283. Although the individual's use of pornography at work was causing him difficulties, his use at home was not, and they did not address such use directly in the course of the counseling. *Id.* at 281-83. The psychologist further testified that the individual now monitored himself, which, in conjunction with his working conditions, placed him at low risk of resuming inappropriate computer use while at work. *Id.* at 284-85. Finally, the psychologist expressed his opinion that the individual did not need continued counseling or treatment regarding his impulse control disorder. *Id.* at 300-01.

In addition to the counseling the individual received, he is also subject to external controls on his computer usage at work. His supervisors directed that the monitor at his workstation face the door of his workstation, and established rules regarding his use of the internet. *PSI* at 36-43.

The individual stated in his PSI that he has complied with those rules and established some of his own. For example, his supervisors advised him not to use Yahoo as a search engine, in order to avoid any appearance that he might be gaining access to adult websites through that search engine; he decided to avoid all search engines. *Id.* at 37-38, 41. In addition, as a result of this current process, the individual is now aware that all employees' internet access and instant messaging are monitored daily by his employer. Tr. at 54 (testimony of cyber-security scanner). On the other hand, the individual is not aware that his employer has taken any steps to block access on his work computer to any portion of the internet, other than those site-wide controls that affect all computers at his location. *Id.* at 313-14. Therefore, refraining from visiting websites he formerly frequented involves a degree of self-control as well. I have considered these forms of oversight along with the treating psychologist's assessment that the individual now has the internal motivation to refrain from viewing pornography and engaging in other inappropriate computer activity at work and, in addition, the evidence that the individual has not visited any inappropriate internet sites at work in roughly two years. It is my opinion that the risk of the individual resuming such activity is extremely low.²

A broader concern also arises from the individual's computer abuse. A person who chooses not to follow established rules and policies may be more likely to ignore rules that apply to the safeguarding of classified material. In this case, the individual has acknowledged that he was aware that his computer usage at work did not comply with company policies. PSI at 12. He ignored those rules by engaging in his chosen behavior. There is no evidence in the record, however, that the individual has behaved in an unlawful or incautious manner in any other aspect of his life. After considering the record before me, however, I cannot conclude that his workplace computer abuse demonstrates a significant risk that he might fail to respect other laws and policies that govern conduct, particularly those that concern the handling of classified material.

Regarding the other circumstances that raised concerns for the individual's honesty, the evidence in this proceeding mitigates those concerns. There is no dispute that, even as he admitted his inappropriate use of his work computer to his supervisor, the cyber-security investigator, and his wife, the individual minimized the amount of time he spent on that activity. To his credit, there is no evidence that he continued to downplay his involvement with pornography or instant messaging, or was otherwise not candid, in his communications with the LSO. Nevertheless, the fact remains that his initial disclosures of his misconduct were less than full ones. When questioned about the individual's behavior under these circumstances, the treating psychologist stated, "That seems like a pretty normal response" due to the embarrassing nature of the matter. Tr. at 302. He further stated that the individual's minimization did not alter his opinion that the individual was at low risk for resuming his computer abuse at work. *Id.*

² The DOE security concern, as set forth in the Notification Letter, is only with the individual's use of his computer at work to view and discuss material of an adult nature. The DOE expresses no concern with regard to the individual's use of his home computer for this purpose. *Personnel Security Hearing (Case No. TSO-0422)*, 29 DOE ¶ 83,017 at 86,809 n.9 (March 7, 2007); *Personnel Security Hearing (Case No. VSO-0212)*, 29 DOE ¶ 83,002 at 86,739 n.2 (February 6, 2007). I note, however, that the individual has taken measures to conceal the fact of his home usage, which will be addressed below.

Finally, the individual offered the following explanation of his visiting the eBay website later on the same day as his interview with the cyber-security investigator. The LSO's stated concern with regard to this event arises from statements the individual made during the PSI. When asked whether he had accessed any inappropriate sites after he made his disclosure to his supervisor, the individual stated that he had not. PSI at 57. When asked whether he had accessed the eBay website after he made his disclosure to his supervisor, the individual stated, "Not to my knowledge." *Id.* at 58. The LSO contends in its Notification Letter that these responses raise questions regarding the individual's honesty, because the Investigative Report revealed that he had in fact accessed eBay for more than one hour after the investigation. Investigative Report at 4.³ At the hearing, the individual explained that, at the PSI, he denied visiting any inappropriate websites after his disclosure to his supervisor because he "would never have considered eBay as an inappropriate website." Tr. at 237. Moreover, he testified that he did not recall that particular visit to eBay. *Id.* at 239. He testified that he and co-workers used eBay as a resource for seeking hard-to-find replacement parts for some of the outdated equipment at his worksite. *Id.* at 237. His supervisor testified that he encouraged his workers to engage in this activity. The individual admitted, however, that he visited eBay for personal as well as for work-related shopping. *Id.* at 157. Nevertheless, given that his supervisor has on occasion instructed him and his co-workers to use the eBay website for work purposes, it strikes me as reasonable that he may not have considered such visits inappropriate, nor recalled any one particular visit to eBay, at the time of the PSI. Considering the voluntary manner in which he brought his computer abuse to light, and his candor during the PSI, I cannot find that these two statements that the individual made during his PSI are additional evidence of his lack of honesty.

I find that the individual is at low risk for resuming his practice of accessing inappropriate internet sites at work. I also find that the individual is highly unlikely to be less than forthright in the future in his furnishing of information with regard to personnel security determinations. Based on the record before me, I find that the individual has mitigated the LSO's security concerns about his honesty, reliability, and trustworthiness.

2. The Individual's Susceptibility to Pressure

The LSO determined that the individual might be susceptible to pressure, coercion or duress because he had stated during the PSI that he had not explained to his wife the extent and frequency of his inappropriate computer activity that led to his suspension. Notification Letter. He reported at that time he had never told his wife that the inappropriate activity included the viewing of pornography, but he knew that she suspected that to be the case. PSI at 54. He also stated that she was not aware that he was engaging in this activity more than merely during his lunch break. *Id.* at 55. He did not personally believe that viewing pornographic material was morally reprehensible, nor had it caused any problems at work or at home. *Id.* at 58. Although he acknowledged that his wife did not approve of his viewing pornography on the internet, this difference of opinion was not a matter of contention in their marriage. *Id.* at 69-70. Nevertheless, as the personnel security specialist testified at the hearing, his wife's opposition to

³ The LSO apparently decided that the individual's statements did not give rise to an additional concern under 10 C.F.R. §710.8(f), which relates to information that the individual has "[d]eliberately misrepresented, falsified, or omitted significant information from a . . . personnel security interview . . ."

pornography contributes to the individual's vulnerability, because he would prefer to conceal such activity from her. Tr. at 230-31.

The wife provided compelling testimony at the hearing. She clearly stated that the individual had offered to explain the full extent of his involvement with inappropriate internet usage, but she had told him that she did not want to know the details.

And, honestly, in [my husband's] defense, I said, I don't . . . need to know that. He said, how much of this do you want to know about? And I said, you tell me that it was a problem, you've told me that you went to someone for help, you told me that you are not doing that anymore, that you felt terrible about it, you were embarrassed about it; I don't need to be your babysitter. We've been married for twenty years, . . . When he tells me something I believe him. . . . We've both made some mistakes, . . . let's get past it and move on with our lives. . . . I didn't want to know a lot of detail about it, knowing that maybe it would upset me, maybe it wouldn't, but we were at a point where enough is enough.

Id. at 23, 24. She further stated that, if she were to learn more details of her husband's viewing choices in the past, she would cope with it. More important, she believed that her husband recognized that she would cope with it. *Id.* at 36-37. She testified that, in the course of their marriage, they have kept information from each other "to not hurt each other or to not upset the balance or make things tough at home." *Id.* at 31-32. Their communication skills were poor for many years of their marriage, but they have improved in the last few years. *Id.* at 45. By the time of the hearing, though, the individual's wife felt that they had a more open dialogue:

So whatever comes out of this, whatever web sites you may have—tell me whatever things you may have said to whoever, I can [handle] that now. I can say, okay, this concerns me, this upsets me, and here's why. And, he said well, here's what I thought, here's why I did that. And at least there's some dialogue there. Not to say that everything's going to be rosy, that—it won't be. And this hasn't been a pleasant experience for any of us, I'm sure, but I think it's important for [the hearing officer] to know where I'm coming from, and that [my husband] knows he doesn't have to protect me from this, and that we do what we can and we move on at what's best for us. . . . [B]ut the two things I would never question is [my husband's] loyalty. I know what he's done he's done to protect me. He could have made it easier on himself, but he tried to make it easier on me. I think that speaks for his character.

Id. at 50, 51.

The individual and his wife each testified that even though the individual might prefer to keep certain information from his wife, he would not do so if it required breaking laws. The wife drew a distinction between "[s]aving someone's feelings or giving them one less thing to worry about" and risking a career or the family's future by succumbing to blackmail, and she was adamant that her husband would never take such risks. *Id.* at 31-32. The individual stated the same thought differently: "I do have a deep desire to protect my wife and her feelings. I do not

have a desire to break any laws or perform any acts that are against the security of our nation, and I would never do that to protect my wife.” *Id.* at 329. The LSO emphasized evidence that the individual had not, even as of the hearing, fully disclosed to his wife the scope of his inappropriate computer usage. *Id.* at 37-38. After considering the individual’s wife’s moving testimony, I am convinced that the individual would make any necessary disclosure regarding such activity to his wife rather than yield to pressure to keep it from her.⁴

The individual’s behavior in chat-room settings underlies the LSO’s final concern for his susceptibility to pressure, coercion and duress. At the hearing, the individual emphasized that the information he revealed to unknown persons in chat rooms about his profession and duties was all publicly available, and referred to electronic “pages” from his employer’s website to support that statement. *Indiv. Exs.*; *Tr.* at 235-36; *see* PSI at 16, 51. The personnel security specialist testified that the individual’s susceptibility to pressure, coercion, or duress did not arise from the individual’s revealing non-public information about his work, but rather from his revealing his unhappiness in his personal life. Revealing such personal information and feelings, when combined with the public information about his work, created an operational security concern that was not evident to the individual at the time under the following scenario. Someone skilled in counterintelligence could recognize that the employee had access to classified information by the nature of his position. Such a person could offer the individual support and consolation by playing to his personal vulnerabilities, and gain his trust in this manner. The individual might then feel comfortable revealing sensitive information to the person when he otherwise would not. *Tr.* at 220-21. The individual admitted at the hearing that he had not realized until then that the information he had revealed about his personal situation had rendered him vulnerable in the manner the personnel security specialist described. *Id.* at 255. The scenario described by the personnel security specialist in her testimony, while improbable, is clearly possible, and explains why the individual’s disclosures in chat rooms raised a concern for the LSO. However, there is no evidence in this proceeding that the scenario came to pass. Moreover, now that the individual is aware of this potential vulnerability and, in any event, no longer visits chat rooms, there is virtually no likelihood that it might happen in the future.

V. Conclusion

As explained in this Decision, I find that the local DOE security office properly invoked 10 C.F.R. § 710.8(l) in suspending the individual’s access authorization. For the reasons described above, I find that the individual has sufficiently mitigated those security concerns. I

⁴ The record contains evidence that the individual has not disclosed to his children that he has viewed pornography. PSI at 55-56; *Tr.* at 30, 243. During the PSI, the individual stated that he would not want his children to know that he has viewed pornography, because he did not want his children to know that he, as their father, had any flaws. PSI at 56. At the hearing, the personnel security specialist testified that, in her opinion, withholding this fact from his children rendered him susceptible to blackmail or similar pressures. *Tr.* at 202, 212, 232-33. The individual testified at the hearing that his children were now 13 and 19 years old, and that he would have no problem with his children knowing that he views pornography online. *Id.* at 243-44. The LSO did not cite this matter as a security concern in the Notification Letter, and thus the individual was not on notice to prepare a response to this concern. Nevertheless, I believe the likelihood is extremely low that individual would disclose classified material rather than speak openly to his children, in response to threats of blackmail, duress, coercion or other forms of pressure. I base my assessment of this matter on the evidence before me and after considering the individual’s demeanor and credibility at the hearing.

therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: April 8, 2008